[APPELLATE CIVIL JURISDICTION.]

AITKEN, J.
November 1, 1937.

DASON vs. KIT HOP & ANOR.

CHIN SEN SAM vs. DASON & ORS.

REFERENCE TO JUDGE OF QUESTIONS OF LAW ARISING THEREIN, UNDER SECTION 571 OF THE CIVIL PROCEDURE CODE.

[IPOH CIVIL SUITS Nos. 932 of 1936 and 613 of 1937.]

Practice—judgment debt—payment by instalments—non-compliance with order for—application for committal— rescission of order—Court's jurisdiction—Civil Procedure Code, Section 345 (iii).

On the hearing of an application to commit a judgment debtor for failure to comply with an order for payment of the judgment debt by instalments, the Court, after hearing both parties, has power under Section 345 (iii) of the Civil Procedure Code, to vary or rescind the order or suspend its operation.

REFERENCE to the Judge under Section 571 of the Civil Procedure Code.

Cur. Ad. Vult.

AITKEN, J.—First as to the point of law arising in Ipoh Civil Suit No. 932/36 under Section 345(iii) of the Civil Procedure Code, which provides that a Court may from time to time vary an order for payment of a judgment debt by instalments, or suspend its operation, or rescind it. The learned Magistrate wishes to know whether he has power thereunder, at any time, irrespective of whether the matter is before the Court or not, to rescind such an order.

In my opinion a Magistrate must exercise his powers under Section 345(iii) of the Civil Procedure Code judicially, that is, he must give both the judgment creditor and the judgment debtor an opportunity of being heard in regard to any proposed variation, suspension, or recission and of calling evidence in support of their respective contentions, before he can properly come to a decision to vary, suspend or rescind.

In Ipoh Civil Suit No. 932/36, I gather that both the judgment creditor and the judgment debtor were before the Magistrate on an application by the former calling upon the latter to shew cause why he should not be committed to prison for failure to pay the judgment debt by instalments as he had been ordered to do. The learned Magistrate, apparently after hearing both parties, refused to commit the judgment debtor to prison for his failure to pay the instalments as ordered, and purported to rescind that order. Provided that he listened to everything the judgment creditor wished to urge against rescission and gave him an opportunity of adducing evidence on the point, did he desire to do so, I think that he acted within the power conferred on him by Section 345(iii) of the Civil Procedure Code in making such order of rescission.

Secondly as to the preliminary point taken by Mr. Thivy, in Ipoh Civil Suit No. 613/37, that this order of rescission, with which I have just been dealing, is null and void because no application for rescission was before the Court when it was made: In my opinion that point is not open to Mr. Thivy, since no steps have been taken to get that order set aside.

As has often been pointed out, so long as a Court has jurisdiction to decide a question, it has jurisdiction to decide it wrongly as well as rightly; and the only way to get rid of a wrong decision in such circumstances is to appeal against it. For this reason the Court which has got to decide Ipoh Civil Suit No. 613/37 cannot consider whether the rescission order made in Ipoh Civil Suit No. 932/36 was rightly or wrongly made; it must assume that it was rightly made and act accordingly.

Order accordingly.

[APPELLATE CIVIL JURISDICTION]

CUSSEN, J.

November 30, 1937.

SAK'AMAH BINTE SARIDIN alias SAK'AMAH BINTI HAJI ABU BAKAR .....Appellant.

vs.

TASMIN BIN ABDUL SAMAD ....Respondent.

[SELANGOR CIVIL APPEAL No. 23 of 1937]

Muhammadans—husband and wife—land registered in wife's name in trust for husband —agreement providing for transfer to husband in event of divorce of wife at her request—legality of—laches—limitation—jurisdiction.

The plaintiff claimed from the defendant the transfer to him of the land held by the defendant in trust for him or in the alternative $500.00 "on account of the value thereof." It was agreed between the parties, being husband and wife, that if the plaintiff (husband) divorced the defendant the property "was to be divided according to Hukum Shara'" but that if the defendant herself asked for divorce the land should be transferred to the plaintiff. The defendant at her own request, was divorced in August 1931 and a document was drawn up and signed by the defendant which reads as follows:—

> "I, the undersigned Sa' amah binte Haji Abu Bakar request my husband named Tasmin bin Abdul Samad to divorce me. If and when he divorces me I will give back the land 5 acres grant 4727 to my husband Tasmin bin Abdul Samad. I will not do anything otherwise but I promise to transfer the land
>
> R. T. of Sa'amah
>
> I the said Tasmin bin Abdul Samad hereby agree to the request of my wife Sa'amah binti Haji Abu Bakar.
>
> Sd. Tasmin"

The Magistrate gave judgment for the plaintiff for $500.00, or the return of the land in question. The defendant appealed. The following, among others, were the grounds of appeal—(a) Laches, (b) No consideration, (c) Limitation and (d) Jurisdiction.

Held, that (1) the equitable doctrine of laches had no application inasmuch as the plaintiff was in full possession and use of the land.

(2) the agreement as to the disposition of the property in the event of divorce was consonant with the principles of Muhammadan law and custom among Malays and was therefore a perfectly legal one

(3) the land being held in trust and not beneficially section 9 of the Limitation Enactment applied and there was no bar to the suit; and

(4) the "value in dispute" for the purposes of determining jurisdiction should be the value of the land at the date of filing of the plaint, and the Magistrate had exceeded in his jurisdiction, as the true value was $875.

MAGISTRATE'S CIVIL APPEAL.

A. K. Sen for the plaintiff (Respondent).

P. C. Au Yong for the defendant (Appellant).

Cur. Ad. Vult.

CUSSEN, J.—This was a suit in which in his plaint the Plaintiff alleged that in 1925 he bought a piece of land and had it registered in the name of his wife, the Defendant, in trust for him and on the express undertaking and agreement that she would retransfer *the land to him or pay him the value thereof* if the Defendant was divorced by the Plaintiff at the request of the Defendant. In his evidence the conditions were more fully stated as being that "it was mutually agreed that if I divorced her the property was to be divided according to 'Hukum Shara' and if Defendant herself asked for divorce the land should be given back to me."

Defendant, at her own request, was divorced by Plaintiff on 11-8-31 and a document Exhibit B was drawn up and signed by the Defendant which reads as follows:—

> "I, the undersigned Sa'amah binte Haji Abu Bakar request my husband named Tasmin bin Abdul Samad to divorce me. If and when he divorces me I will give back the land 5 acres grant 4727 to my husband Tasmin bin Abdul Samad. I will not do anything otherwise but I promise to transfer the land.
>
> R. T. of Sa'amah
>
> I the said Tasmin bin Abdul Samad hereby agree to the request of my wife Sa'amah binti Haji Abu Bakar.
>
> (Sd.) Tasmin"

This document, in my opinion, does not create any new rights or obligations between the parties but merely sets in operation the agreement made in 1925 when the land was registered in the name of the Defendant.

In this suit the Plaintiff asks for an order that the Defendant transfer the land to him or in the alternative pay $500 *"on account of the value thereof."*

On the facts the Magistrate accepted the story of the Plaintiff and rejected that of the Defendant who denied "in toto" the allegations of the Plaintiff.

The Magistrate gave judgment for Plaintiff for $500 or the return of the land in question. From this judgment the Defendant appeals.

Various grounds of appeal were put forward, some of fact and some of law.

One ground of appeal on fact is that the "agreement" Exhibit B was obtained by fraud and under undue influence and coercion. This was considered by the learned Magistrate and he found against the allegation and decided that the document was voluntarily signed by the Defendant without any undue influence.

There is no reason why I should interfere with this finding and in fact I agree with it.

The other grounds of appeal were—

(a) Laches;
(b) No consideration or an immoral consideration;
(c) Limitation;
(d) Jurisdiction.

As regards (a) it suffices that I am of opinion that the equitable doctrine of "laches" has no application to a case of this nature; furthermore the Plaintiff was in full possession and use of the land, and in such case the doctrine of "laches" does not hold.

As regards (b)—consideration—I am of opinion this also fails; the agreement as to the disposition of the property in the event of divorce was a perfectly proper one, and consonant with the principles and practice of Muhammedan Law and Custom among Malays, and this divorce itself was a recognised form, i.e. the "Khula divorce."

(c) The question of Limitation is more difficult. Before the learned Magistrate—when both the counsel who now appear in the appeal also appeared at the trial, counsel for the Defendant argued that the suit was governed by either article 47 or article 92 of the Limitation Enactment (Cap. 18)—by article 47 as regards the money claim for compensation and by article 92 as regards the claim for the land itself which was viewed as a claim for specific performance.

Counsel for Plaintiff relied upon articles 95 and 103. The learned Magistrate held that article 103 applied.

On appeal counsel for the Appellant relied again on articles 47 and 92, but counsel for Respondent admitted that in so far as the claim was for Specific Performance it fell under article 92 but that in so far as it was a claim for compensation it fell under article 95.

But it appears to me that one important aspect of the Plaintiff's case has been lost sight of—both by the counsel and by the learned Magistrate, and that is that the Plaintiff clearly alleges that the Defendant held this land in trust and not as a beneficial owner. The error, as I see it, seems to have arisen from directing attention almost exclusively to the document Exhibit B as creating the cause of action instead of the circumstances in 1925 when Plaintiff bought the land and put it in the name of the Defendant and it was agreed what should happen in the event of a divorce.

It is in my opinion clear—although perhaps if proper attention had been given to this aspect of the case it might have been brought out more definitely in evidence—it is I repeat clear that the Defendant held this land in trust. It may be that it became what is termed "Harta Pencharian" in which case it would still be held in trust and not beneficially. If that is so section 9 of the Limitation Enactment applies and there is no bar by Limitation to this suit.

I come now to the final ground of appeal which is that the Magistrate had no jurisdiction to hear the suit as the land was admittedly valued over $500.

The civil jurisdiction of a first class Magistrate is defined in section 57(i) (b) of the Courts Enactment (Cap. 2). It is "to hear and determine all suits within its local jurisdiction when the value in dispute does not exceed $500."

Now the present value of this land is about $875, the value given by the Collector of Land Revenue and accepted by the Magistrate—the Plaintiff himself values it at $700—$800. At the date of the divorce in 1931 the value of the land was $500 at the most.

It was suggested, so it would appear, at the hearing that the "value in dispute" for the purpose of determining jurisdiction should be the value at the date of the divorce when Plaintiff was entitled to have the land transferred to him and not the value at the date of the filing of the plaint. It was argued for the Defendant that the valuation at $500 was a deliberate under-valuation to enable the suit to be brought in the Magistrate's Court.

In my opinion the value for the purposes of section 57(i) (b) of the Courts Enactment must, in this case, when what is claimed, what is in dispute, is a piece of land, be the value at the date of the filing of the plaint. In this case, therefore, the true value in dispute is $875.

On the appeal counsel for Respondent admitted that he thought this was so as regards the claim for the land itself but held that it need not apply to the claim for $500 "*on account of the value thereof.*" I do not agree with this.

He next suggested that it could be treated as a case where a Plaintiff has relinquished a portion of his claim.

But section 42 of the Civil Procedure Code requires that the plaint *shall* contain the following particulars—"(f) if the Plaintiff has relinquished a portion of his claim the amount so relinquished."

In my opinion therefore it cannot be so treated.

I have no doubt whatever that this is a case of intentional under-valuation to enable the suit to be brought in the Lower Court. It is to me clear that the value was fixed at $500 because that amount was the limit of the jurisdiction and not because it was the value of the land. It follows that the Magistrate had no jurisdiction to hear the suit.

This objection was taken by the counsel for Defendant-Appellant at the beginning of the hearing. When this happens the proper procedure is for the Magistrate to try as a preliminary issue the question of the "value in dispute."

While I can in a certain sense sympathise with the desire in a case of this nature to have it tried in the local Court of the Magistrate, still I am inclined to think that undervaluation such as this may occur more frequently than is realised.

Finally for the reasons I have stated I hold that there was no jurisdiction to hear the suit. The appeal must therefore be allowed and the judgment and decree set aside.

I need hardly point out that as there was no jurisdiction the matter of course is not. *Res Judicata.*

The appeal is allowed with costs.

Under section 49(i) (f) Civil Procedure Code I order the plaint to be returned to the Plaintiff.

Appeal allowed.